



POLICE DEPARTMENT CITY OF NEW YORK

April 28, 2017

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Diery Louis
Tax Registry No. 940395
81 Precinct
Disciplinary Case No. 2016-15243

Charges and Specifications:

1. Said Police Officer Diery Louis, while assigned to the 81st Precinct, while on duty, on or about and between December 19, 2015 and December 21, 2015, wrongfully engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, to wit: said Police Officer did not inform a member of the Early Case Assessment Bureau of the District Attorney's Office that a robbery victim had recanted his identification of a prisoner.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT – GENERAL REGULATIONS

Appearances:

For the Department: Samuel Yee, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For Respondent: Craig Hayes, Esq.
Worth, Longworth & London, LLP
111 John Street – Suite 640
New York, NY 10038

Hearing Date:

March 15, 2017

Decision:

Guilty

Trial Commissioner:

ADCT Jeff S. Adler

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on March 15, 2017. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. The Department called Police Officer Feng Chen, Lieutenant Ronald Anderson, and Sergeant Darren d'Auteuil as witnesses. The Department also introduced the hearsay statements of Person A and Person B. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent guilty of the charged misconduct.

FINDINGS AND ANALYSIS

This case involves Respondent's handling of a robbery arrest on December 19, 2015. At about 2130 hours, complainant Person A delivered Chinese food to [REDACTED] [REDACTED]. As he was preparing to leave, Person A was approached by two men, at least one of whom exited [REDACTED]. The two men demanded money, and removed a sum of currency and a cell phone from Person A's possession. Person A returned to the restaurant.

Person B, [REDACTED] the owner of the restaurant, called 911. Respondent and Lieutenant Ronald Anderson responded to the restaurant, where they met with Person A and Person B. Respondent then drove the lieutenant to the scene of the robbery, while another unit escorted Person A

and Person B to the location. Person B, who spoke some English, helped translate for Person A, who did not.

The officers rang the bell at [REDACTED], a three-story house. No one answered, but a male stuck his head out of a 3rd story window and asked what the officers wanted. Person A pointed at the male and identified him as one of the men who had robbed him. The officers asked the male to come down and open the front door, but he refused. On the lieutenant's orders, the front door was breached, and six people were removed from the house, including the male in the window who Person A had identified. Person A again identified the male as one of the robbers, and then confirmed the identification a third time to Lieutenant Anderson. The male, Person C, was arrested and transported to the 81 Precinct, as was another individual at the scene. Person A and Person B were brought to the precinct as well.

Back at the precinct, Respondent was assigned the arrest of Person C. Respondent went to speak with Person A and Person B in order to obtain contact information, but they were reluctant to cooperate. When Respondent explained that he needed the information so that the District Attorney's Office could contact them for court, Person A and Person B became even more adamant in their refusal to cooperate. It is alleged that Person A and Person B then informed Respondent that the male arrested was not the actual robber. The next morning, Respondent spoke with a paralegal from the Early Case Assessment Bureau ("ECAB") of the [REDACTED] District Attorney's Office in order to have the criminal complaint drawn up. Since Respondent concedes that he did not inform the paralegal that Person A had recanted, the issue is whether such recantation really did occur.

Neither Person A nor Person B appeared to testify, prioritizing other obligations. Officer Feng Chen testified that he was the interpreter for the Department interviews of Person A and Person B on December 22, 2015. An audio recording of those interviews, and the accompanying transcripts, were admitted into evidence (Dept. Exs. 1, 1A and 1B). Hearsay evidence is admissible in an administrative tribunal, and a case may be proven with such evidence, provided it is found to be sufficiently reliable and probative on the issues to be determined. See *Ayala v. Ward*, 170 A.D.2d 235 (1st Dept. 1991); *In the Matter of 125 Bar Corp. v. State Liquor Authority of the State of New York*, 24 N.Y.2d 174 (1969). To be sure, it is preferable to have testimony from a live witness, where opposing counsel has the opportunity to cross-examine, and the court can observe the demeanor of the witness. In the absence of such live testimony here, this tribunal listened carefully to the prior recorded statements of Person A and Person B, and reviewed the accompanying transcripts. Even with the assistance of Officer Chen, a Department certified Fukienese interpreter, there is a great deal of confusion throughout both interviews, with non-responsive answers and inconsistent responses.

In his statement, Person A explained how he was robbed by two men. One exited the adjoining building and was dressed in black, while the other already was outside and was dressed in red. (Dept. Ex. 1A at 7-10) When the people later were removed [REDACTED]

[REDACTED] by police, Person A initially identified the man dressed in red as one of the robbers. Person A then went back inside the police car with Person B because it was cold. While still at the scene, he claims he told an unknown white officer that the male dressed in red was not one of the robbers, and the officers did not arrest him. Person A believed that two other men were arrested that night, though he wasn't sure who

they were. (Dept. Ex. 1A at 29-31, 34-37) When they were back at the precinct, Person A, through Person B, told a male black officer in plain clothes that none of the people removed from the house were the ones who robbed him. (Dept. Ex. 1A at 45, 47)

In her statement, Person B claimed that when the police removed five or six people from the house, Person A said that the one dressed in red was "probably the one." After Person B and Person A returned to the police car, Person B told one of the officers that nobody there was involved in the robbery. (Dept. Ex. 1B at 17-18, 21-22) Person B wanted to get back to work, but was told she needed to go to the precinct. Person B claims that at the precinct, she again tried to tell the officers that none of the people removed from the house were part of the robbery, but she was having difficulty communicating with the officers because of the language barrier. (Dept. Ex. 1B at 29-31)

Lieutenant Ronald Anderson testified that when an individual stuck his head out of the third floor window [REDACTED]. Person A, with Person B translating, identified that individual as one of the males who had robbed him. The lieutenant then had the officers on the scene go inside the building and remove six people (five males and one female). A show-up was conducted, and Person A, through Person B, identified the same male as one of the robbers. Lieutenant Anderson confirmed the identification a third time with Person A, and the individual, Person C, was placed under arrest. (Tr. 33-35, 43-45)

Back at the precinct, Respondent was assigned the arrest. According to the lieutenant, Respondent approached him and said that Person A was now saying that Person C was not one of the people who robbed him. Lieutenant Anderson spoke with Person A and Person B himself "for clarification", and they told the lieutenant that the person arrested

did not commit the crime. The lieutenant testified that he did not believe Person A's recantation, noting that Person A and Person B seemed scared, and that they were primarily concerned with getting back to work. Nevertheless, Lieutenant Anderson allowed the arrest to move forward. He told Respondent to speak with the squad and the DA 's office to "let them know what was taking place." The lieutenant testified that he specifically instructed Respondent to "speak to the DA and let them know that this recant had taken place." He suggested to Respondent that the DA might decline prosecution, and told Respondent to be governed by the DA's decision. (Tr. 36-40, 45-46, 49-51)

Sergeant Darren d' Auteuil of IAB testified that after he was assigned to investigate this matter, he twice spoke with the paralegal from ECAB who prepared the criminal court complaint after speaking with Respondent. That paralegal, Person D, did not appear to testify as per the instructions of his supervisor. Instead, the sergeant testified as to his two conversations with Person D, and introduced into evidence the criminal court complaint (Dept. Ex. 2) as well as two worksheets summarizing his conversations with Person D (Dept. Exs. 3 and 4). The sergeant also noted that Person C was held in custody for approximately two days based on this arrest, and that his case was dismissed about one or two months later. (Tr. 61-63, 67)

According to Sergeant d' Auteuil, he first spoke with Person D on December 23, 2015, to find out what Respondent had told him about Person A's identification of Person C. According to the sergeant, Person D told him that Respondent did not mention anything about Person A recanting. (Tr. 64) When he and Person D spoke again on February 7, 2017, Person D again stated that there had been no mention of a recantation, and added that Respondent also did not indicate to him that Person A was reluctant

to cooperate and would need to be subpoenaed. (Dept. Ex. 4, Tr. 67, 80) The sergeant acknowledged that his two conversations with Person D were by phone, yet he did not record either one of those conversations. (Tr. 70, 76)

Respondent testified that he and Lieutenant Anderson responded to the Chinese restaurant, where the lieutenant spoke with Person A. Person A, with Person B translating, stated that he had been robbed by two males who came out [REDACTED] [REDACTED]. Person A and Person B were brought to [REDACTED], where Person A pointed at Person C who was leaning out the window and said, through Person B, "That's him." Officers entered the location and brought out Person C and five other occupants who were lined up, and Person A again identified Person C. Lieutenant Anderson then confirmed the identification with Person A a third time, and Person C was placed under arrest. During the show-up, Person C said to Person A, "I know where you work." (Tr. 88- 93, 99, 109, 114-115)

Person A and Person B were brought to the precinct, and Respondent, who was assigned the arrest, went to gather contact information from Person A and Person B. Person B, who was translating, questioned why the officer needed Person A's cell phone number, and Respondent explained how the District Attorney's Office would need to contact them for court. According to Respondent, Person B immediately said no, without even consulting with Person A. Respondent asked her to tell Person A what he had said, which she apparently did, and Person A also said "no, no, no, no, no" about going to court. Respondent insisted that Person A never recanted to him. (Tr. 95-97, 104)

Respondent informed Lieutenant Anderson that they didn't want to go to court, that there was a communication problem, and that he was unable to get their cell phone numbers. The lieutenant went to speak with Person A and Person B himself, but Respondent was not present for that conversation. Lieutenant Anderson then told Respondent that he should go ahead and process the arrest, and that he should let the DA know the situation. Respondent took this to mean that he should inform the DA that they had a difficult witness who was scared and did not want to proceed. (Tr. 97-99)

The next morning, paralegal Person D from ECAB called Respondent in preparation for drawing up the complaint. Respondent testified that he provided the particulars of the robbery, and informed Person D that there was a language barrier with Person A. Respondent also told Person D that they would need to subpoena Person A because Person A was scared, and Person B, whose priority was to be at work at the restaurant, was a barrier to her brother's cooperation. Respondent testified that he did not tell Person D that Person A had recanted "because he never did." (Tr. 101- 103, 118-119)

Since Respondent, himself, concedes that he never told the ECAB paralegal that Person A had recanted, the issue here is whether Person A did, in fact, recant to Respondent. Respondent insisted that Person A never did recant the identification to him. According to Respondent, Person A and Person B merely expressed their strong reluctance to cooperate, and this is the information he passed on to the lieutenant, and then to the ECAB paralegal.

Contrary to Respondent's self-serving denial, the testimony of Lieutenant Anderson provides compelling evidence against Respondent. According to the

lieutenant, Respondent told him that Person A had just recanted. The lieutenant then confirmed the recantation with Person A, and specifically instructed Respondent to inform the DA's office of the recantation.

Counsel for Respondent argues that Lieutenant Anderson is not worthy of belief, because if Person A really had recanted, the lieutenant would have voided the arrest at the precinct. This tribunal disagrees. While it is true that one viable option here would have been for the lieutenant to void the arrest, it also is feasible that he chose to pass the matter on to the DA's office for further evaluation. Since Person A had identified the suspect three times, it was reasonable for Lieutenant Anderson to infer that the "recantation" was motivated more by fear and convenience than by truth. Under the circumstances, it's plausible that the lieutenant preferred to have someone from the DA's office explore the matter further with Person A before voiding the arrest. Lieutenant Anderson came across as professional and candid on the witness stand. His testimony was consistent and logical, and I credit his account.

The statements of Person A and Person B provide some corroboration for the lieutenant's version of events, as each of them claimed that Person A recanted at the precinct. However, the probative value of these hearsay statements is minimal. In their recorded statements regarding the robbery and the subsequent police action, Person A and Person B often sounded confused and uncertain, and neither account is totally reliable regarding what precisely transpired. At the arrest scene and the precinct, they both seemed more motivated to get back to work than assist law enforcement with the investigation. At the time of their recorded interviews three days later, they still appeared reluctant to cooperate. They each gave clear indications of the fearful nature of this incident

Although they both insisted that Person A, with Person B translating, recanted at the precinct, it was unclear from their statements to whom exactly they recanted.

The hearsay account of Sergeant d'Auteuil's conversations with the ECAB paralegal also provides minimal help in resolving the issue here. Person D did not appear to testify, and neither of his conversations with the sergeant was recorded. According to the sergeant, Person D stated that Respondent never told him that Person A was reluctant to appear. Person D, himself, was not subject to cross examination on the details of his conversation with Respondent, and this tribunal does not credit his account on this point. Instead, I find it more likely than not that Respondent did inform the paralegal of Person A and Person B's reluctance, which may be why Respondent was made the deponent in the complaint and given subpoenas for Person A and Person B.

However, even if Respondent did tell Person D that Person A and Person B were reluctant to cooperate, providing that limited information was not adequate under the circumstances. Respondent had a more significant obligation to inform the paralegal that Person A had recanted, so that the DA's office could properly assess the case. It is undisputed that Respondent failed to do so. Respondent, himself, acknowledged this omission, claiming that he said nothing because Person A did not, in fact, recant. However, based primarily on the testimony of Lieutenant Anderson, the credible evidence has established that Person A did recant his identification to Respondent and the lieutenant at the precinct. Lieutenant Anderson then specifically instructed Respondent to communicate the recantation to the DA's office. This Respondent failed to do, and I find him guilty of the specification.

PENALTY RECOMMENDATION

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent was appointed to the Department on January 9, 2006. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum. In 2015, Respondent forfeited seven (7) vacation days for courtesy toward a supervisor, failure to maintain a clean shaven appearance, and failure to make adequate activity log entries.

The Advocate recommends that Respondent forfeit twenty (20) vacation days as an appropriate penalty. As the Advocate notes, there isn't much precedent for this exact type of case. In *Disciplinary Case No. 8517/12* (Nov. 6, 2014), cited by the Advocate, a four-year officer with no disciplinary history forfeited ten (10) vacation days for refusing a DA paralegal's request to contact a sergeant in order to learn further details of the arrest. The Advocate suggests that under the circumstances of this case, including Respondent's disciplinary history, a higher penalty is warranted here.

On balance, I agree that a higher penalty is appropriate here, though not as high as that suggested by the Advocate. On the one hand, this tribunal is mindful that the lack of cooperation on the part of Person A and Person B was a factor in how the arrest was processed. It was clear from the credible evidence that Respondent and Lieutenant Anderson both believed that Person A's initial identification of Person C was valid, and neither officer credited the recantation. Nevertheless, Person A did recant, and it was Respondent's responsibility to at least inform the ECAB paralegal of that recantation, in order to allow for further investigation by the District Attorney's Office. In the interests of justice, the DA's office might have immediately directed a void or declined to prosecute. By not

even mentioning the recantation to the paralegal, Respondent delayed a fair and timely assessment of the situation, which did not serve the interests of justice.

Taking into account the totality of facts and circumstances in this matter, Respondent's disciplinary history, and his numerous medals for excellent police work, I recommend that Respondent forfeit fifteen (15) vacation days as an appropriate penalty.

Respectfully submitted,



Jeff S. Adler
Assistant Deputy Commissioner Trials

APPROVED

OCT 17 2017

JAMES P. O'NEILL
POLICE COMMISSIONER

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER DIERY LOUIS
TAX REGISTRY NO. 940395
DISCIPLINARY CASE NO. 2016-15243

Respondent was appointed to the Department on January 9, 2006. On his last three annual performance evaluations, he received 4.0 overall ratings of "Highly Competent" in 2013, 2014 and 2015. He has eleven medals for Excellent Police Duty and one medal for Meritorious Police Duty. [REDACTED]

[REDACTED]

[REDACTED]

In 2015, Respondent forfeited seven (7) vacation days for (i) speaking discourteously to a sergeant by raising his voice in a loud manner; (ii) [REDACTED] and (iii) failing to clearly indicate the identity of an arrestee and the location of arrest in his Activity Log, as required. In the same proceeding, he was found Not Guilty of (i) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Respondent has also been subject to monitoring on multiple occasions. From February 8, 2008 to August 27, 2008, Respondent was on Level I Force Monitoring, for having three or more CCRB complaints in one year. Immediately thereafter, he was placed on Level II Disciplinary Monitoring from August 27, 2008 to February 27, 2010. Respondent was subsequently placed on Level II Force Monitoring from October 5, 2010 to October 15, 2010, for having three or more CCRB complaints in one year. Respondent is currently on Level II Force Monitoring, which has been in effect since July 15, 2013, for having three or more CCRB complaints in one year.

For your consideration.



Jeff S. Adler
Assistant Deputy Commissioner Trials